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May 17, 2010

TO: Our Coastal Clients

FROM: Clifford Schulman

RE: Frequently Asked Legal Questions (FALQ's) on Gulf Oil Spill Liability and Damages

As a result of the threat to Florida's shoreline due to the oil spill in the Gulf of Mexico, numerous questions have arisen regarding potential legal liability for cleanup costs and damages incurred by local governments. This memo attempts to answer some of those questions, as well as dealing with the issue of steps that local governments should take now in order to best preserve claims for any cleanup costs and damages.

This memo does not discuss disaster preparedness steps that could or should be taken by the city or county, since those matters fall within the purview of the administration and/or commission or council.

**1. What legal remedies exist to recover cleanup costs and damages in the event the spill hits our beaches and wetland areas?**

The primary statute that governs liability for spill impacts is the Oil Pollution Act of 1990 (33 U.S.C. 2701, et seq.) (the "Act" or "OPA"). This federal law was enacted shortly after the Exxon Valdez spill and created a "strict liability" cause of action against the party/ies responsible for the spill, which made it easier to sue and prevail against a responsible company. The Act also created a trust fund (the Oil Spill Liability Trust Fund or OSLTF) which can fund certain oil spill cleanup activities and may provide for certain compensation for damages from such spills.

Other legal remedies are also available, in addition to claims and actions under the Act, and these are more fully discussed below.

## **2. What compensation is available under the Act to individuals, businesses and governments affected by the Gulf Oil Spill?**

Under the Act, the party/ies responsible for the oil spill may be liable for cleanup costs and damages to individuals and businesses adversely affected. Commercial fishermen, hotel and tourism industry businesses, property owners, governments and others may be entitled to damages related to the disaster, including:

- real property damages;
- natural resource damages;
- personal property damages;
- loss of profits and earning capacity;
- loss of commercial and subsistence use of natural resources;
- increased costs of public services;
- cost for disaster planning, cleanup and restoration;
- and loss of tax revenues, royalties, rents, fees, and net profit shares.

However, certain of these damages and costs may not be sought by municipal corporations (cities) but may only be sought by the state or counties. Thus, "natural resource damages"<sup>1</sup> may only be sought by the state as "Trustee" for the public. "Revenue" damages, including tax losses, may only be sought by the state or counties (political subdivisions of the state), and not cities.

## **3. Is compensation available to tourism businesses and workers for lost income or profits as a result of the Gulf oil spill?**

Yes. Under OPA, if any person, corporation or government has lost profits or income as a result of an oil spill, they may submit a claim for lost profits or earning capacity. These would include many hospitality and tourism businesses that rely on coastal areas for their livelihood such as recreational fishing companies, marinas, businesses which take people on pleasure cruises around the harbor, coastal restaurants, hotels, wildlife excursions, and other tourism businesses.

## **4. What has to be shown or proven to receive compensation?**

As previously noted, OPA is a statute of strict liability and no negligence on the part of the responsible party has to be alleged or proven. The only proof that is required is: the party you seek compensation from was either the lessee or holder of the permit to drill or user of the well on the submerged lands where the well was located; that a spill occurred; in a navigable waterway; and cleanup cost were incurred and damages were suffered by the claimant.

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<sup>1</sup> "natural resource damage" is the cost of restoring injured resources to their condition prior to the damage, compensation for the interim loss of injured resources pending recovery, and the reasonable cost of a damage assessment.

**5. What defenses are there to the responsible party to claims made under the Act?**

Since OPA is a strict liability statute, defenses are very limited and are only:

- Act of God;
- Act of War;
- Acts of a third party, where the third party is totally unrelated to the responsible party and is not contractually related to the responsible party. The defense would only be applicable where the responsible party has exercised due care in its operations and took precautions against such a spill.

**6. What is needed to file a claim for damages resulting from the Gulf Oil Spill with the National Pollution Funds Center?**

To submit a claim for compensation for damages or reimbursement of cleanup costs, the Act requires submission of the following:

- Proof that the oil spill meets all OPA requirements as noted above;
- Documentation of reimbursable costs and damages from the spill;
- A complete claims package.

The claims are processed through the United States Coast Guard's National Pollution Funds Centers located throughout the United States. However, prior to claims being filed with the Center, the claims must be presented to and rejected by (or not settled within 90 days of the claim) the responsible party/ies.

**7. Does the Act cap the amount of money an oil company is liable for after an oil spill?**

There is no cap on amounts that are spent for cleanup expenses incurred by a claimant. However, for spills that come from off-shore wells, all claims of damage are capped for the entire incident at \$75 million. Be advised that Congress is presently considering amending the Act to increase this cap to \$10 billion and making it retroactive in order to cover this spill. If this legislation is passed there will probably be litigation challenging any retroactive application of the law.

Also note that the cap would not apply if it could be shown that the responsible party/ies:

- Caused the incident by gross negligence or willful misconduct or;
- Caused the incident as the result of violation of an applicable Federal safety, construction, or operating regulation or;
- Didn't report the incident as required by law or;
- Didn't cooperate with the proper officials or the Federal On-Scene Coordinator (FOSC) in charge of the spill cleanup; or
- Didn't comply with government orders related to the spill cleanup.

We would anticipate that many claimants may assert that the cap should not apply due to any one or more of these reasons.

**8. Where and when would an action have to be filed under the Act?**

Generally, lawsuits under the Act would have to be filed within three (3) years of the damage or cleanup. These suits may be filed in either federal or state court.

**9. What is the Oil Spill Liability Trust Fund (OSLTF)?**

The Oil Spill Liability Trust Fund (OLSTF) was created by Congress in 1986 and is funded by a \$.05 tax on every barrel of oil produced by each oil company. It authorized the use of the Fund to pay for certain costs and damages resulting from an oil spill. The Fund is used to pay for some clean-up and removal costs following a qualified oil spill as well as certain claims for damages. However, payments of damages from the Fund are presently capped at \$1 billion for each incident.

**10. Must all claims for damages or cleanup costs be brought under the Act?**

No. The Act did not preempt the ability to file claims under other statutes, either federal or state, or to file claims under the common law, such as negligence, trespass, nuisance, etc. However, the filing of any such claims could not take advantage of the liberal strict liability standard of the Act unless permitted by state law. Some states, including Florida, do have strict liability statutes that would cover such a spill and without a cap on damages. *See*, Florida Statute, Section 376.12. In addition, any claims filed under the Act cannot be paid while any other litigation is on-going under any other law.

**11. What should local governments be doing now to best protect its legal rights to seek and receive compensation?**

The Florida Department of Environmental Protection ("DEP") has been designated by the Governor as the lead agency to deal with prevention, mitigation, and restoration of areas hit by this oil spill. DEP will also be coordinating reimbursements to local governments for expenditures made to deal with the impacts of the spill. Under the authority of an Executive Order of the Governor, DEP has issued an Emergency Final Order (OGC No. 10-1610) that deals with the following subjects:

- Government entities reimbursement for actions taken under the Order;
- Identification of and permits required for staging areas for storage of spill generated debris;
- Approval for temporary containment booms and sorbent materials;
- Approval for placement of temporary floating devices and other devices or methods of and for oil spill containment;
- Emergency, temporary permits, issued in the field, for access roads and staging areas;
- Review and approval of emergency permits for local oil spill response plans;

- Temporary letters of consent for the use of State owned lands for activities authorized under the EFO.

The authority for implementation of the Emergency Final Order and approvals, notices and coordination will be the District Offices of FDEP.

In addition, BP Oil has admitted that it is a "responsible person" under the Act. As such, BP has granted the State of Florida an initial \$25 million to pay for initial state and local preparation and response costs. FDEP has indicated that these funds would initially be directed for protective measure for the coastlines that are threatened by the oil spill, based on projected impacts. FDEP has established a process for reimbursement under this program.

We recommend:

- Immediate contact and coordination should be made with the applicable FDEP District Office for more information on compliance, plan review and financial requirements for reimbursement;
- Immediate implementation of stringent record keeping on the city/county since future reimbursement of expenditures will be dependant on these records. These records should include employee time and expenditure records, since these costs will be reimbursable from the Fund, including early resources that are expended in planning for the oil spill response efforts.
- Obtain the necessary forms/programs in order to make a request for reimbursement under the initial BP grant.

If you have any further questions or we may assist you in any of these matters, please feel to call.